Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ODELIA S. BRAUN,

Petitioner,

v.

BUREAU OF STATE AUDITS, KURT SJOBERG, ANN CAMPBELL, AND DORE TANNER,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court's opinion in *Paul v. Davis*, 425 U.S. 985 (1976) be overruled?

2. Should this Court's opinion in *Paul v. Davis*, 425 U.S. 985 (1976) be limited, so that it does not apply to state agencies which do not hold "formalized proceedings" but which nevertheless have the power to destroy state employees' reputations and careers?

3. Do California's statutes empowering its State Auditor to issue reports to the public defaming state employees, without giving such employees any rights to notice, to hearing, to confront accusers, or to counsel, violate such employees' rights to Due Process of law under the 14th Amendment and give rise to a cause of action under 42 U.S.C. § 1983?

4. Did Dr. Braun's complaint state a cause of action under 42 U.S.C. § 1983?

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PETITION FOR A WRIT OF CERTIORARI

Dr. Odelia S. Braun respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, First District, in this case.

OPINIONS BELOW

The opinion of the Court of Appeal is attached hereto as Appendix A.

JURISDICTION

The California Court of Appeal, First District, filed its opinion on November 23, 1998. A copy of that opinion is attached hereto as Appendix A. The California Supreme Court denied the petition for review on March 9, 1999. A copy of that order is attached hereto as Appendix B.

This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED IN THIS CASE

Section 1 of Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

California's "Reporting of Improper Governmental Activities Act"

(California Government Code Sections 8547 through 8547.12)

8547. *Short title*

This article shall be known and may be cited as the "Reporting of Improper Governmental Activities Act."

8547.1. *Legislative intent; disclosure of improper activities*

It is the intent of the Legislature that state employees and other persons should disclose, to the extent not expressly prohibited by law, improper governmental activities.

8547.2. *Definitions*

For the purposes of this article:

(a) "Employee" means any individual appointed by the Governor or employed or holding office in a state agency as defined by Section 11000.

(b) "Improper governmental activity" means any activity by a state agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10, and 8547.11, "improper governmental activity or activities" includes any activity by the

University of California or by an employee, including an officer or faculty member, that otherwise meets the criteria of this subdivision.

(c) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.

(d) "State agency" is defined by Section 11000. "State agency" includes the University of California for purposes of Sections 8547.5 to 8547.7, inclusive.

8547.3. *Use or attempted use of official authority or influence to interfere with disclosure of information; prohibition; civil liability*

(a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to the State Auditor matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) Any employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(d) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

8547.4. *Administrative authority*

The State Auditor shall administer the provisions of this article and shall investigate and report on improper governmental activities.

8547.5. *Investigative audits*

Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the State Auditor may conduct an investigative audit of the matter. The identity of the person providing the information that initiated the investigative audit shall not be disclosed without the written permission of the person providing the information unless the disclosure is to a law enforcement agency that is conducting a criminal investigation.

8547.6. *Assistance in conduct of investigative audits*

The State Auditor may request the assistance of any state department, agency, or employee in conducting any investigative audit required by this article. If an investigative audit conducted by the State Auditor involves access to confidential academic peer review records of University of California academic personnel, these records shall be provided in a form consistent with university policy effective on August 1, 1992. No information obtained from the State Auditor by any department, agency, or employee as a result of the State Auditor's request for assistance, nor any information obtained thereafter as a result of further investigation, shall be divulged or made known to any person without the prior approval of the State Auditor.

8547.7. *Report of improper governmental activities; enforcement authority*

(a) If the State Auditor determines that there is reasonable cause to believe that an employee or state agency has engaged in any improper governmental activity, he or she shall report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority. If appropriate, the State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the State Auditor determines appropriate.

(b) The State Auditor shall not have any enforcement power. In any case in which the State Auditor submits a report of alleged improper activity to the head of the employing agency or appropriate appointing authority, that individual shall report to the State Auditor with respect to any action taken by the individual regarding the activity, the first report being transmitted no later than 30 days after the date of the State Auditor's report and monthly thereafter until final action has been taken.

(c) Every investigative audit shall be kept confidential, except that the State Auditor may issue any report of an investigation that has been substantiated, keeping confidential the identity of the individual or individuals involved, or release any findings resulting from an investigation conducted pursuant to this article that is deemed necessary to serve the interests of the state.

(d) This section shall not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.

8547.8. *Reprisals or other improper acts for disclosure of improper governmental activities; complaints; limitation of actions; civil and criminal penalties*

(a) A state employee or applicant for state employment who files a written complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 8547.3, may also file a copy of the written complaint with the State Personnel Board, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the board, shall be filed within 12 months of the most recent act of reprisal complained about.

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having disclosed improper governmental activities, is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for up to a period of one year. Any state civil service employee who intentionally engages in that conduct shall be disciplined by adverse action as provided by Section 19572. If no adverse action is instituted by the appointing power, the State Personnel Board shall invoke adverse action as provided in Section 19583.5.

(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having disclosed improper governmental activities shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by

the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a) of this section, and the board has failed to reach a decision regarding any hearing conducted pursuant to Section 19683.

(d) This section is not intended to prevent an appointing power, manager, or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a personnel action with respect to any state employee or applicant for state employment if the appointing power, manager, or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has disclosed improper governmental activities as defined in subdivision (b) of Section 8547.2.

8547.9. *Transmission of investigative report to state auditor*

Notwithstanding Section 19572, if the State Personnel Board determines that there is a reasonable basis for an alleged violation, or finds an actual violation of Section 8547.3 or 19683, it shall transmit a copy of the investigative report to the State Auditor. All working papers pertaining to the investigative report shall be made available under subpoena in a civil action brought under Section 19683.

8547.10. *University of California employees; complaints or reprisal or other improper acts for disclosure of improper governmental activities; civil and criminal penalties*

(a) A University of California employee, including an officer or faculty member, or applicant for employment may file a written complaint with his or her supervisor or manager, or with any other university officer designated for that purpose by the regents, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having disclosed improper governmental activities, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint shall be filed within 12 months of the most recent act of reprisal complained about.

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a University of California employee, including an officer or faculty member, or applicant for employment for having disclosed improper governmental activities, is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for up to a period of one year. Any university employee, including an officer or faculty member, who intentionally engages in that conduct shall also be subject to discipline by the university.

(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or applicant for employment for having disclosed improper governmental activities shall be liable in an action for damages brought against him or her by the

injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents.

(d) This section is not intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a personnel action with respect to any university employee, including an officer or faculty member, or applicant for employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has disclosed improper governmental activities.

8547.11. *Use or attempt by University of California employees to use official authority or influence to interfere with disclosure of information; prohibition; civil liability*

(a) A University of California employee, including an officer or faculty member, may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to a

University of California official, designated for that purpose by the regents, or the State Auditor matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) Any employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(d) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

8547.12. *California State University employees; complaints alleging reprisal or other actual or attempted acts in response to disclosure of improper governmental activities; penalties; conflict with memorandum of understanding*

(a) A California State University employee, including an officer or faculty member, or applicant for employment may file a written complaint with his or her supervisor or manager, or with any other university officer designated for that purpose by the trustees, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having disclosed improper governmental activities, together with a sworn statement that the contents of the written complaint are true, or are

believed by the affiant to be true, under penalty of perjury. The complaint shall be filed within 12 months of the most recent act of reprisal complained about.

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a California State University employee, including an officer or faculty member, or applicant for employment for having disclosed improper governmental activities, is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for up to a period of one year. Any university employee, including an officer or faculty member, who intentionally engages in that conduct shall also be subject to discipline by the university.

(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or applicant for employment for having disclosed improper governmental activities shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the trustees. Nothing in this section is intended to prohibit the injured party from seeking a

remedy if the university has not satisfactorily addressed the complaint within 18 months.

(d) This section is not intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action, or from taking or failing to take a personnel action with respect to any university employee, including an officer or faculty member, or applicant for employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has disclosed improper governmental activities.

(e) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action.

A SUMMARY OF THIS PETITION

As interpreted by the California Court of Appeal in this case, California's "whistleblower protection" statutes authorize the California State Auditor to issue a report publicly defaming a state employee – without offering that employee any right to notice, to a hearing, to offer rebuttal evidence, or any other procedural rights. Thus, in the present case, the Auditor was authorized by statute to release a report to California's newspapers "finding" that Petitioner – a physician in charge of a program on emergency medical care, at the University of California Medical Center – had embezzled public funds, having given the physician no procedural rights before making and issuing this "finding." This has effectively destroyed the physician's career in public health.

This result appears to be consistent, however, with this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), which held that a person's reputation is not "liberty" or "property" as those words are used in the Due Process Clause of the 14th Amendment.

We submit that it is time for this Court to reexamine *Paul* – and to overrule or clarify that decision. We doubt that the Court intended to permit state agencies to ruin a state employee's right to earn a living in her chosen career without at least minimal procedural protections.

STATEMENT OF THE CASE

The Complaint

Dr. Braun's third amended complaint (CT 346) alleges the following.

In 1985, Dr. Braun was appointed Assistant Clinical Professor of Medicine at the University of California Medical Center in San Francisco ("UCSF"). ¶1 & ¶50 of Complaint, CT 347, 354. In 1987, she was appointed Medical Director for the Center for Prehospital Research and Training program ("CPRT"). ¶54, CT 354. (CPRT supported emergency medical services in the San Francisco community, providing training for the San Francisco Fire Department.) Dr. Michael Callaham was chief of the Division of Emergency Medicine at UCSF and was Dr. Braun's supervisor. ¶5, CT 347-348. Dr. Floyd Rector was Chair of the Department of Medicine and was Dr. Callaham's supervisor. ¶7, CT 348.

In 1992, Dr. Braun accused Dr. Callaham of misappropriating her research and claiming it as his own in articles he had published. ¶58, ¶59, CT 353. Dr. Callaham retaliated by initiating audits of Dr. Braun's program and

falsely claiming that Dr. Braun was responsible for financial improprieties (including embezzlement) while directing CPRT. ¶59, ¶64, ¶65, ¶93, CT 359-361, 375.

In fact, Dr. Rector – not Dr. Braun – was responsible for the financial management of CPRT. In order to avoid taking responsibility for the financial system used by CPRT, Dr. Rector falsely told the California Bureau of State Audits that Dr. Braun was responsible for an improper payroll system and other financial improprieties. ¶81, ¶82, ¶83, ¶90, ¶99, CT 365-367, 374, 377-378.

In June of 1994, Bureau of State Audits personnel leaked to the press confidential information regarding its investigation of CPRT. ¶212, CT 423-424. This resulted in a series of articles about CPRT in August of 1994 in the San Francisco Chronicle, which contained false and defamatory statements about how CPRT was managed. ¶184-187, CT 416-417.

On November 21, 1994, the Bureau of State Audits released its report on CPRT to the "Capitol Press Corps" – representative of the state's leading newspapers. ¶114, ¶126, CT 383, 387-388.[1] While this report did not mention Dr. Braun by name, it castigated the "CPRT administrator" and referred to this person by a feminine pronoun ("she" and "her"). The San Francisco Chronicle had no trouble identifying this person for its readers as Dr. Odelia Braun. CT 783-784. The report stated that the Bureau's investigation was initiated when "we received an allegation under the Reporting of Improper Governmental Activities Act," i.e., an accusation from a person protected by California's "whistleblower" statutes. CT 494.

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[1] In addition, the Bureau placed the report on the Internet. *See* http:/www.bsa.ca.gov/bsa/since93.html.

The report makes no mention of the identity of the person making this allegation.

The report concluded that the "CPRT administrator" had engaged in illegal and "criminal" activities. ¶125-¶141, CT 387-403. The Bureau reported that Dr. Braun committed many criminal violations. The Bureau's report states on its title page that "Employees Of The University of California, San Francisco, Improperly and Illegally Managed The Center For Prehospital Research and Training." CT 480. The report goes on to find that "A CPRT administrator . . . conspired to submit falsified payroll documents" (CT 490; *see also* CT 506)[2], that "A CPRT administrator and another CPRT official misused university resources for their personal use and benefit" (CT 492)[3], that "the CPRT Administrator" was involved in violations of California Penal Code § 72 and California Penal Code § 424 (submission of false claims for payment) (CT 507) and in "falsifying payroll records" and "falsifying time sheets" (CT 508), that "the CPRT administrator" committed misdemeanors (Govt. Code § 6203) by submitting false certifications (CT 515), that "the CPRT administrator used UCSF resources for personal benefit" (CT 548),[4] and that "The CPRT administrator also used assets deposited to the foundation account to benefit

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[2] Conspiracy to "cheat or defraud" or to commit any act injurious to "due administration of the laws" is a felony. California Penal Code § 182.

[3] This would be embezzlement by a public official – a felony. *See* California Penal Code § 504.

[4] This too would be embezzlement under California Penal Code § 504.

herself and her relatives" (CT 550).[5] The Bureau sent its report to the State Department of Justice and to the San Francisco District Attorney's Office. CT 387.[6] Neither of those agencies chose to prosecute Dr. Braun. Thus, Dr. Braun was never given any forum in which to show the world that she was not the criminal which the Bureau had labeled her.

The report noted that the University disagreed with many of the Bureau's conclusions and findings and had submitted a list of errors in the report. In fact, the University had informed the Bureau that Dr. Rector – not Dr. Braun – was responsible for the financial management of CPRT. ¶81, CT 365. Nevertheless, the Bureau announced that it stood by all of its findings and conclusions. CT 568-569.

In fact, the Bureau's accusations against Dr. Braun were false. ¶125 through ¶132, CT 387-393. The Department of Medicine (which was run by Dr. Rector – not Dr. Braun) was responsible for financial management of CPRT. ¶140, CT 401-402. Dr. Braun had no role in the payroll mechanism which the Bureau had criticized. ¶130, CT 390-391. (UCSF officials – including its General Counsel – had told the Bureau that accusations against Dr. Braun were false, but the Bureau had disagreed. ¶83, ¶126, ¶127, ¶133-¶136, ¶138; CT 366-367, 387-388, 401.)

On the same day the Bureau of State Audits released its report, UCSF advised Dr. Braun that it was closing

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[5] This too would be embezzlement under California Penal Code § 504.

[6] The Bureau sent the report to several other agencies, including UCSF, the State Department of Justice, the Internal Revenue Service, the San Francisco District Attorney's Office, the State Legislature, and the Governor. ¶125, ¶126, CT 387-388.

CPRT "for financial reasons" and that she was terminated. ¶114, CT 383-384.

Two days after the Bureau issued its report to the press, The San Francisco Chronicle began running a series of stories about CPRT, mentioning Dr. Braun by name and falsely accusing her of financial improprieties. ¶100-¶109, CT. 378-381. For example, the Chronicle falsely informed its readers that "Braun conspired with center employees to submit falsified payroll sheets." ¶100, CT 378. *See also* CT 784.

The complaint alleges that Bureau investigators Ann Campbell and Dore Tanner and State Auditor Kurt Sjorberg committed the torts of intentional and negligent infliction of emotional distress (¶167-¶171, ¶195, CT 411-412, 420), defamation (¶176, CT 413), and negligence (¶203, CT 422), and also violated Dr. Braun's right to Due Process of law (¶207-215, CT 423-425).

This Due Process claim alleges that these defendants failed to inform Dr. Braun of the charges against her, refused to grant her access to the evidence against her, and ignored material submitted by her. *Ibid.* These Due Process violations caused Dr. Braun loss of her employment and injury to her career and professional reputation. ¶215, CT 424-425.

The trial court sustained those parties' demurrer to the complaint, without leave to amend, and dismissed the complaint. CT 916-920, 930-931. The California Court of Appeal affirmed on November 23, 1998. Slip opinion (attached as Appendix A), page 17. The California

Supreme Court denied Dr. Braun's petition for review on March 9, 1999.[7]

The Court of Appeal Opinion

The Court of Appeal opinion is partially published, at 67 Cal.App.4th 1382, 79 Cal.Rptr.2d 791. It appears in full in Appendix A to this Petition.

The Court of Appeal held that California Civil Code § 47 bestows an "absolute privilege" on Bureau of State Audit officials to defame public employees. Slip Opinion, pages 7-13.

The Court of Appeal noted that the complaint included a cause of action for denial of Due Process rights. Slip opinion, pages 5-6. The Court held, however, that Dr. Braun had no right to damages against these defendants for depriving Dr. Braun of her "liberty" or "property" without due process of law. The Court held that, while 42 U.S.C. § 1983 permits damage actions against state officials for violations of the Due Process Clause of the federal Constitution, this is permitted only when such officials are sued in their "individual" capacities, and Dr. Braun's complaint failed to allege this with sufficient specificity. Slip Opinion, pages 16-17.[8]

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[7] The complaint also named the University of California and the San Francisco Chronicle as defendants. The University settled with Dr. Braun, and the Court of Appeal held that the Chronicle's defamatory statements were privileged (in an earlier opinion, reported at 52 Cal.App.4th 1036).

[8] This ruling was mistaken. The Court of Appeal stated that the complaint "merely alleges that the individual respondents are residents of the state, and that they acted 'at least in part' in the course and scope of their employment with the Bureau." *Of course* the complaint alleged that these defendants acted "at

Therefore, the Court found it unnecessary to decide whether a state employee is entitled to any Due Process

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least in part" for a state agency. Otherwise, the complaint would have failed to state a cause of action under § 1983, which applies *only* to acts committed "under color of state law."

The Court of Appeal misunderstood the distinction between *suing* state officials in their individual capacities and *alleging that they acted* as individuals when they committed their unconstitutional acts. The former is *required* for a § 1983 damage suit; the latter would take the case *out* of § 1983.

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), this Court held that a state is not a "person" under § 1983, and therefore is not subject to suit under § 1983. And, while "person" does include a state *official*, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. [Citation.] As such, it is no different from a suit against the state itself." *Id.* at 71. But *Will* was distinguished in *Hafer v. Melo*, 502 U.S. 21 (1991), where the Court held that "state officials sued in their individual capacities are 'persons' for purposes of 1983." *Id.* at 23. The Court explained, "the claims considered in *Will* were official-capacity claims as the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is *sued*, not the capacity in which the officer *inflicts the alleged injury*." *Id.* at 26; emphasis added.

In the present case, the complaint *sues* defendants Campbell, Tanner, and Sjorberg as individuals. The caption of the complaint names these three defendants *as individuals*, and *not* as state officials. CT 346. And there is nothing in the *body* of the complaint which states that they are being *sued* in anything but their individual capacities – even though the body of the complaint alleges that they *acted* – "at least in part" – in their official capacities.

And most important, the complaint seeks damages against these officials personally. CT 433-434. *Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir.1988) ("damage actions brought under 42 U.S.C. § 1983 are generally viewed as suits against the individual"). *See also Cerrato v. San Francisco Community College*

protections before the Bureau may release defamatory statements about her to the press. Slip Opinion, page 16.

REASONS FOR GRANTING THE PETITION

We submit that the questions presented in this petition are of exceptional importance.

California's Whistleblower Statutes

California Government Code §§ 8543 et seq. establish the California Bureau of State Audits, which is headed by the State Auditor. In 1993, the California Legislature added to these statutes §§ 8547 et seq., called the "Reporting of Improper Governmental Activities Act" – commonly called "The Whistleblower Act." This Act protects people who report alleged improper activities by government employees to the Bureau of State Audits. Section 8547.5, for example, provides that the Bureau shall not disclose the identity of such an informant without that person's consent.

The Act authorizes the State Auditor to investigate reports from such informants (§ 8547.5). If the State Auditor determines that there is "reasonable cause" to believe that an employee has engaged in "any improper governmental activity," the Auditor "shall" report "the nature and details" of the activity to the agency which employs or appoints that employee. § 8547.7. There is nothing in these statutes which prevents the Auditor from including in these "details" the identity of the accused employee. In

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District, 26 F.3d 968, fn. 16 (9th Cir.1994); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir.1990).

Thus, the complaint does properly seek damages against these defendants for violating 42 U.S.C. § 1983.

addition, "if appropriate," the State Auditor "shall" report this information to the California Attorney General, the policy committees of the California legislature, "*and to any other* authority that the State Auditor deems appropriate." *Ibid.*, emphasis added. In the present case, the Court of Appeal expressly held that this language authorizes the State Auditor to release his report *to the press and to the public*. Slip Opinion, pages 11-13.

An "improper governmental activity" is defined by the Act as "any activity by a state agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency."§ 8547.2(b).

Nowhere does the Act provide any procedural protections for an accused employee. The Act fails to provide for any notice of charges. The Act fails to provide any right to a hearing. The Act fails to provide any right to counsel. The Act fails to provide any right to confront the "whistleblower" or even to know what the "whistleblower" has told the agency.

In sum, as interpreted by the California Court of Appeal, the Act authorizes the State Auditor to issue a public report "finding" that a government employee has stolen government funds and committed other felonies – even though the accused employee has been given no procedural rights at all, and even though the effect of this

public "finding" is to destroy that employee's career. And that is exactly what happened in the present case. This, we submit, is a violation of the Due Process Clause of the 14th Amendment.

But several opinions from this Court present an unclear picture regarding whether such an employee has been deprived of "liberty" or "property." This Court has held that a *state agency which holds "formalized proceedings"* deprives an accused person of "liberty" or "property" when it defames such a person. But the Court has also held that *local officials who hold no "formalized proceedings"* do *not* deprive one of "liberty" or "property" when they destroy that person's reputation. A state administrative agency such as the California Bureau of State Audits does not fit into either of these categories. Which rule applies to such an agency?

The cause of this conundrum is *Paul v. Davis*, 424 U.S. 693 (1976).

Paul v. Davis

Paul was a departure from two prior cases: *Jenkins v. McKeithen*, 395 U.S. 411 (1969), and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

In *Jenkins*, state statutes required a state Commission to make public findings as to whether individuals had violated state criminal laws regarding labor organizing. Even though the statutes required the Commission to grant witnesses the right to notice, the right to counsel, and the right to submit questions for the Commission to ask other witnesses, the Court held that these protections were inadequate to satisfy procedural Due Process. "In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the

Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights." 395 U.S. at 429. The Court assumed, without discussion, that the Commission had deprived the accused individual of a "liberty" or "property" interest under the Due Process Clause.

In *Constantineau*, the Court had held that a police chief was liable under § 1983 for posting a notice in all liquor stores that liquor was not to be sold to Constantineau, because the chief had given no prior notice or hearing to Constantineau regarding whether she merited this treatment. The Court held that the police chief had violated her right to procedural Due Process: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. at 437.

In *Paul v. Davis*, two local police chiefs distributed flyers to businesses stating that Davis was an "active shoplifter." Davis sued the two chiefs under 42 U.S.C. § 1983, claiming that they failed to give him a hearing regarding the truth of this statement before the distribution, and this deprived him of "liberty": he alleged that the resulting harm to his reputation would inhibit him from entering stores and "would seriously impair his future employment opportunities." 424 U.S. at 697. This Court held that Davis failed to state a cause of action, because his claim of injury was solely one of "stigma to one's reputation," which was not sufficient to constitute "liberty" as that term is used in the Due Process Clause of the 14th Amendment.

Justices Brennan, Marshall, and White dissented in *Paul*, noting that "The stark fact is that the police here

have officially imposed on respondent the stigmatizing label 'criminal' without the salutary and constitutionally mandated safeguards of a criminal trial." *Id.* at 718. And most pertinent to the present case, they wrote:

> The logical and disturbing corollary of this holding is that no due process infirmities would inhere in a statute constituting a commission to conduct ex parte trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person as a Communist, a traitor, an "active murderer," a homosexual, or any other mark that "merely" carries social opprobrium. The potential of today's decision is frightening for a free people. [*Id.* at 721.]

The dissent also noted that the majority decision was inconsistent with both *Jenkins* and *Constantineau*. But the majority purported to "distinguish" both cases.

Regarding *Constantineau*, the majority quoted the following language from that case: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. 433, 437. The Court in *Paul* then stated:

> We think that the italicized language in the last sentence quoted, "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the

> defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment. [424 U.S. at 708-709.]

The Court in *Paul* (at footnote 4, 424 U.S. at 706) also distinguished *Jenkins v. McKeithen*:

> We cannot agree with the suggestion of our Brother BRENNAN, dissenting, Post, at 1173, that the actions of these two petitioner law enforcement officers come within the language used by Mr. Justice Harlan in his dissenting opinion in *Jenkins v. McKeithen*, 395 U.S. 411, 433, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). They are not by any conceivable stretch of the imagination, either separately or together, "an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing." Id., at 438, 89 S.Ct., at 1857, 23 L.Ed.2d, at 426. Indeed, the actions taken by these petitioners in this case fall far short of the more formalized proceedings of the Commission on Civil Rights established by Congress in 1957, the procedures of which were upheld against constitutional challenge by this Court in *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). There the Court described the functions of the Commission in this language: "It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any Legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take

> any affirmative action which will affect an individual's *legal* rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action." Id., at 441, 80 S.Ct., at 1514, 4 L.Ed.2d, at 1321 (emphasis supplied).

Paul v. Davis Should Be Overruled or Clarified

Paul's handling of *Constantineau* has led to what some call a "stigma-plus" test: mere stigma is not enough, and there must also be some additional harmful effect on the accused person. *WMX Technologies, Inc. v. Miller*, 80 F.3d 1315, 1319 (9th Cir.1996). This, however, has led to a practical problem which *Paul* failed to consider. The most common "plus" is likely to be an effect on the accused in the *future* – usually loss of employment and career opportunities. When people learn of the official "finding," they will not hire the accused. But applicable statutes of limitations and practical problems of proof require the accused to file suit fairly soon after the "finding" is made known to the public. Thus, the complaint will be filed *before* much of the "plus" has had a chance to occur.

This is exactly what happened in the instant case. The State Auditor's report was issued on November 21, 1994, and Dr. Braun's third amended complaint was filed on February 6, 1996. She was *unable* to allege at that time specific losses of employment opportunities, because they had not yet occurred. But since that time, she has been turned down by several prospective employers because of the State Auditor's report. Dr. Braun is now prepared to prove this at trial, but she could not have alleged this at the time her original or amended complaints were filed.

We submit that *Paul v. Davis* is unworkable and should be overruled. Stigma alone, if substantial, should

be sufficient to constitute "liberty" or "property" under the Due Process Clause.

Paul's handling of *Jenkins* is problematic too. *Paul* appeared to hold that Due Process protections apply *only* to persons accused by "an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing" and which does not hold "formalized proceedings." But how does this apply to an agency like the California Bureau of State Audits? California Government Code § 8543.1 purports to set out the "duties" of the Bureau: "to examine and report annually upon the financial statements prepared by the executive department and to perform other related assignments. . . . " This does not seem to come within the *Paul's* restrictive language (quoted above). But there is other language in *Paul* which suggests that even an agency with a broad mandate must afford procedural protections *to government employees*: "But the court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process *absent an accompanying loss of government employment*." 424 U.S. at 706; emphasis added.[9]

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[9] *See also id.* at 704, where the Court quotes Mr. Justice Jackson's opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 184-185 (1951): "The real target of all this procedure is the government employee who is a member of, or sympathetic to, one or more accused organizations. He not only may be discharged, but disqualified from employment, upon no other ground than such membership or sympathetic affiliation. . . . To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity."

Where does the California Bureau of State Audits fit into this? It publicly finds that state employees have committed felonies, but it does not focus exclusively on such activities. May it publicly defame government employees without giving them any procedural rights?

Many similar agencies in other states do the same thing. *See, e.g.*, Wash.Rev.C. tit. 42, § 42.40.040 (state auditor receiving information from whistleblower may issue report to Attorney General or to "such other authority as the auditor determines appropriate;" no procedural rights are given to accused employee); Fla.Stat. tit. III, § 11.45 (state auditor shall make its report public, and must "make special mention" of any violation of law and any illegal expenditure; no procedural protections are given to accused employee); Mich.Comp.Laws § 15.345 (no procedural protections given to accused employee).[10]

Thus, until these questions are resolved, millions of state employees throughout the country are subject to wanton destruction of rights to earn a living in their chosen careers with no Due Process protections.

We submit that *Paul's* restrictive language distinguishing *Jenkins* should be overruled or clarified.

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[10] By contrast, several states give accused employees greater procedural protections from state agencies investigating and reporting employee misbehavior. *See, e.g.*, Ore.Rev.Stat. tit. 22, § 244.260 (giving accused employee right to notice of charges, but no other procedural rights); Hawaii Rev.Stat. tit. 7, § 84-21 & § 84-31 (giving accused employee right to notice of charges and rights to be heard, to subpoena witnesses and require production of documents, and to cross-examine); La.Stat. tit. 36, § 313, § 1141 (giving accused employee right to notice, counsel, cross-examine, call witnesses, and present evidence); Penna.Stat. tit. 65, § 408 (giving accused employee right to notice, right to request evidentiary hearing, and "due process" rights at hearing).

Paul also expressed concerns about federalism: that an expansive reading of § 1983 would interfere with states' rights to regulate their own affairs, and would tend to replace state defamation laws. But § 1983 was designed to give a federal remedy where state courts might tend to favor state or local officials charged with violating Constitutional protections. And this is exactly what has happened in the present case. The California Court of Appeal has interpreted state defamation law to give wide immunity to Bureau of State Audits officials. If Dr. Braun is given no remedy under § 1983, then she will have no remedy at all.

Paul v. Davis Has Led To Conflicts and Confusion In The Lower Courts

In *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir.1989), the Court of Appeals for the Second Circuit stated: " 'stigma plus' is required to establish a constitutional deprivation, but it is not entirely clear what the plus is."

In *Marrero v. City of Hialeah*, 625 F.2d 499, 513-516 (5th Cir.1980), cert. denied, 450 U.S. 913 (1981), the Fifth Circuit Court of Appeals held that the "stigma-plus" test of *Paul v. Davis* is satisfied if the "plus" is loss of business goodwill – even though that loss was inflicted by private "third" parties, rather than by the government. But in *WMX Technologies, Inc. v. Miller, supra*, 80 F.3d 1315 (9th Cir.1996), the Ninth Circuit refused to follow *Marrero*. "We conclude today that the 'stigma plus' test requires that the defamation be accompanied by an injury directly caused by the Government, rather than an injury caused by the act of some third party." *Id.* at 1320. Throughout the country, decisions are in conflict on this issue. Some hold as *Marrero* did. *See e.g., Little v. City of North Miami*, 805 F.2d 962, 969 (11th Cir.1986). And some hold as *WMX*

did. *See, e.g., Green v. DeCamp*, 612 F.2d 368, 370, 371 (8th Cir.1980); *Goulding v. Feinglass*, 811 F.2d 1099 (7th Cir.), cert. denied, 482 U.S. 929 (1987); *Sullivan v. State of New Jersey*, 602 F.Supp. 1216, 1222 (D.N.J.1985), aff'd 853 F.2d 921 (3d Cir.1988).

This Court should grant the present petition in order to resolve this conflict.

CONCLUSION

California's "Reporting of Improper Governmental Activities Act" subjects 426,700 California state employees and 1,530,500 local government employees[11] to destruction of their reputations without Due Process of law. And similar laws in other states do the same. Until *Paul v. Davis* is overruled or clarified, this problem will continue.

We respectfully request this Court to accept this case for review, in order to settle the important questions of law discussed in this Petition.

Respectfully submitted,

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for Petitioner

Date: June 1, 1999

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[11] Source: California Labor Force & Industry Employment, November, 1998.

APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

ODELIA S. BRAUN, Plaintiff and Appellant, v. BUREAU OF STATE AUDITS et al., Defendants and Respondents.	A075423 (San Francisco County Super. Ct. No. 970990). (Filed Nov. 23, 1998)

Odelia Braun appeals from the judgment in favor of respondents the Bureau of State Audits (Bureau), State Auditor Kurt R. Sjoberg, and Bureau auditors Ann Campbell and Dore Tanner, after their demurrer to appellant's complaint was sustained without leave to amend. Appellant sued respondents for damages arising from the State Auditor's 1994 investigation and report of the Center for Pre-hospital Research and Training (CPRT) at the University of California, San Francisco (UCSF), where appellant worked.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.B.

This appeal presents the first reported challenge to the State Auditor's conduct of an investigative audit under the Reporting of Improper Governmental Activities Act (Gov. Code, § 8547, et seq.; hereafter the Reporting Act). In the published portion of this opinion, we conclude that statements made in the CPRT audit report were privileged under Civil Code section 47, subdivision (b), and thus that appellant's tort claims based on those statements were properly dismissed. In the unpublished portion of the opinion, we uphold the dismissal of appellant's "due process" claims. The judgment is affirmed.

I. BACKGROUND

A. The Statutory Scheme

The Reporting Act is a "whistleblower" law enacted to encourage the disclosure of improper governmental activities. (Gov. Code, § 8547.1.) An "improper governmental activity" is broadly defined as any "that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency." (Gov. Code, § 8547.2, subd. (b).) The Reporting Act prohibits interference with the right to disclose such activities, and retaliation against those who exercise that right. (Gov. Code, § 8547.3, § 8547.8, et seq.)

The Reporting Act is administered by the State Auditor, who heads the Bureau. (Gov. Code, § 8543.2, subd.

(a), § 8547.4.) "In order to be free of organizational impairments to independence, the [B]ureau [is] independent of the executive branch and legislative control." (Gov. Code, § 8543.) "Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the State Auditor may conduct an investigative audit of the matter." (Gov. Code, § 8547.5.) The whistleblower's identity cannot be disclosed without his or her permission except to a law enforcement agency conducting a criminal investigation. (Gov. Code, § 8547.5.) The State Auditor may request assistance with an investigative audit from any state department, agency or employee. (Gov. Code, § 8547.6.) Information disclosed or produced by such a request cannot be divulged without the State Auditor's approval. (Gov. Code, § 8547.6.)

Government Code section 8547.7 provides:

"(a) If the State Auditor determines that there is reasonable cause to believe that an employee or state agency has engaged in any improper governmental activity, he or she shall report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority. If appropriate, the State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the State Auditor determines appropriate.

"(b) The State Auditor shall not have any enforcement power. In any case in which the State Auditor submits a report of alleged improper activity to the head

of the employing agency or appropriate appointing authority, that individual shall report to the State Auditor with respect to any action taken by the individual regarding the activity, the first report being transmitted no later than 30 days after the date of the State Auditor's report and monthly thereafter until final action has been taken.

"(c) Every investigative audit shall be kept confidential, except that the State Auditor may issue any report of an investigation that has been substantiated, keeping confidential the identity of the individual or individuals involved, or release any findings resulting from an investigation conducted pursuant to this article that is deemed necessary to serve the interests of the state.

"(d) This section shall not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter."

B. Appellant's Case

In *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, we addressed appellant's claims in this case based on newspaper articles about investigations of the CPRT and the underlying allegations. As we noted in that opinion, appellant was the medical director of the CPRT, an activity within the UCSF School of Medicine which supported emergency medical services in the community. The State Auditor began an investigative audit of the CPRT in early 1994, after allegations about the CPRT were lodged with the Bureau pursuant to the Reporting Act. In August 1994, a search warrant was obtained based on the affidavit of respondent Tanner for the seizure of

CPRT computers and time records. That month, the execution of this warrant and the State Auditor's investigation of the CPRT were reported in the newspaper. The CPRT was closed and appellant lost her employment there when the State Auditor's investigative report on the CPRT was made public in November of 1994.

The report found that appellant, who was identified in the report as "a" or "the" "CPRT administrator" rather than by name, had "grossly mismanaged" the CPRT. The report accused appellant of numerous improprieties, finding among other things that she had: conflicts of interest relating to contracts between UCSF and the San Francisco Fire Department, where she was also employed; conspired to submit falsified payroll records; participated in the use of a "secret, unauthorized" bank account; falsified deposit records for student tuition fees; directed improper fundraising; used CPRT funds for her personal benefit and that of her family; used CPRT staff to handle her personal travel, bookkeeping, housekeeping, and child care arrangements; and misled the CPRT advisory board of directors about a 1992 audit.

The 73-page report included a 2-page summary of the "University Response" to the charges. This portion of the report noted that UCSF disagreed with a number of the State Auditor's findings, including the finding that appellant had a conflict of interest from her dual employment with UCSF and the San Francisco Fire Department, and the finding that there had been improper expenditures from the CPRT's bank account and petty cash fund. The report stated that the State Auditor had reviewed the list of errors and omissions UCSF identified in the report and disagreed with UCSF's objections.

The report was addressed to the Governor, the President pro Tempore of the Senate and the Speaker of the Assembly, and copies of it were furnished to various other officers and offices of the state government as well as the "Capitol Press Corps." The day after the report was released, the San Francisco Chronicle newspaper published a front-page article about it under the headline, "State Auditors Blast Director of UCSF Center."

Appellant's third amended complaint included detailed allegations contesting the charges in the report. Appellant alleged among other things that the report included "criminal" conflict of interest charges which the Bureau knew were false. Appellant alleged that she had no role in developing the improper payroll practices identified in the report, that these practices were widespread at UCSF, and that she was simply being made the "scapegoat" for them. She alleged that statements were included in the "vitriolic" report "merely to be inflammatory," and that the report's accusation of her gross mismanagement was based on "purposefully false and misleading" conclusions. She alleged that the Bureau contacted "officials at UCSF, the Registry of Charitable Trusts, the State Department of Justice, the IRS, the Franchise Tax Board, the SF District Attorney's office . . . and the San Francisco Fire Department," but that none of these entities concurred with or acted on any of the Bureau's findings against her.

The complaint set forth tort causes of action against respondents for defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. The defamation cause of action identified various false statements in the State Auditor's report, and

alleged that the statements were made with knowledge of their falsity and with implied malice. The causes of action for negligence, and negligent and intentional infliction of emotional distress alleged in general terms that respondents should have known that their statements about appellant were false, and that their conduct was extreme and outrageous and intended to humiliate her. Appellant sought compensatory and punitive damages for defamation based on injury to reputation, loss of employment, and anguish and humiliation.

The complaint also included a cause of action against respondents for "violation of due process rights." This cause of action alleged that: appellant was not informed of the charges against her during the CPRT audit; appellant was refused access to the evidence against her in the audit; respondents ignored evidence submitted on her behalf during the audit; and respondents sought statements under penalty of perjury from her and others during the audit without affording them the assistance of counsel. This cause of action also alleged that: (1) respondents unlawfully disclosed confidential information regarding the audit to members of the public in June of 1994; (2) respondents acted in excess of their jurisdiction in accusing her of having a conflict of interest; and (3) respondent Tanner made anti-Semitic remarks to intimidate and castigate her during the audit. The latter allegations were that when Tanner learned that appellant's family were Holocaust survivors, he told her that his family had been SS officers in Germany, and likened her

alleged misdeeds at the CPRT to "Hitler" and the "Holocaust."[1]

Respondents demurred on the ground that the complaint failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) They demurred to all causes of action, other than the one for "violation of due process," on the ground that the State Auditor's report was privileged under Civil Code section 47, subdivisions (a) (publication in the discharge of official duty) and (b) (publication in official proceeding authorized by law). Multiple additional grounds for the demurrer were advanced as to all causes of action.

The trial court concluded that all proceedings and reports of the State Auditor were absolutely privileged under the Reporting Act and Civil Code section 47, subdivisions (a) and (b), and sustained the demurrer without leave to amend.

II. DISCUSSION

A. Defamation and Other Tort Claims

In *Braun v. Chronicle Publishing Co., supra,* 52 Cal.App.4th at pp. 1043, 1048, we concluded that an

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[1] Appellant asks us to take judicial notice of evidence developed in her case against other defendants. Respondents dispute the facts for which this evidence is offered, and all of the matters appear reasonably subject to dispute. Therefore, the request for judicial notice is denied. (Evid.Code, § 452, subd. (h).) The evidence does not add anything material to the complaint for purposes of the ruling on the demurrer in any event.

investigative audit by the State Auditor under the Reporting Act was an "official proceeding authorized by law" within the meaning of the anti-SLAPP statute (Code Civ. Proc., § 425.16, subd. (e)). We likewise conclude here that such an audit constitutes an "official proceeding authorized by law" under Civil Code section 47, subdivision (b), which provides that "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, [or] (3) in any other official proceeding authorized by law. . . . " Therefore, all statements made in furtherance of a Reporting Act audit, such as those in the search warrant affidavit and the State Auditor's report in this case are protected by the absolute privilege under that statute.

The privilege issue in *Chronicle Publishing* was whether newspaper accounts of the CPRT audit were reports of a "public official proceeding" for purposes of Civil Code section 47, subdivision (d)(1) (fair and true report in public journal). We concluded that they were, and in so doing we rejected appellant's argument, advanced again here, that the term "official proceeding" in section 47, subdivision (b), does not "reach beyond proceedings which resemble judicial and legislative proceedings." (*Braun v. Chronicle Publishing Co., supra,* 52 Cal.App.4th at p. 1051, disagreeing with *Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476.) Where the same words are repeated in a statute there is a presumption that the same meaning is intended (*Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927, 932), and we find no reason to ascribe different meanings to the term "official proceeding" in Civil Code section 47, subdivisions (b) and (d). *Braun v. Chronicle Publishing Co.,*

supra, 52 Cal.App.4th at p. 1051, reflects our belief that the words at issue were used consistently, and thus that interpretation of one of these subdivisions properly informs interpretation of the other. Accordingly, our analysis in *Chronicle Publishing* is dispositive of the closely-related privilege issue presented here.

Our holding that statements made in furtherance of Reporting Act audits are absolutely privileged under Civil Code section 47 is consistent with many other cases which have reached the same conclusion with respect to statements made in or about other types of governmental investigations. (See *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1441 [civil service investigation]; *O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1047-1049 [CHP background employment investigation]; *Dong v. Board of Trustees* (1987) 191 Cal.App.3d 1572, 1594 [National Institutes of Health investigation]; *Green v. Cortez* (1984) 151 Cal.App.3d 1068, 1073 [internal police investigation]; *King v. Borges* (1972) 28 Cal.App.3d 27, 32 [Real Estate Commissioner investigation]; *Crane v. The Arizona Republic* (9th Cir.1992) 972 F.2d 1511, 1517-1519 [investigation by congressional committee and Department of Justice].) Among the decisions squarely on point is *Howard v. Oakland Tribune* (1988) 199 Cal.App.3d 1124, 1128, where this court held that a Department of Education investigation into an alleged misuse of public funds was an "official proceeding" within the meaning of Civil Code section 47, subdivision (d).

Appellant argues that *Pettus v. Cole* (1996) 49 Cal.App.4th 402, supports a contrary result, but that case is inapposite. *Pettus* held that a company's disability verification procedure was not a "judicial proceeding" under

Civil Code section 47, subdivision (b), and thus that the report of a psychiatrist who evaluated an employee's request for disability leave was not privileged under this statute. (*Id.* at p. 437.) Here, unlike *Pettus*, the term "judicial proceeding" is not at issue. *Pettus* is also distinguishable because "the only decision makers involved were a private employer . . . and its employees and agents." (*Ibid.*) There was no *governmental* investigation in *Pettus*.

Our conclusion that the State Auditor's report is within the "official proceeding" privilege is also consistent with many cases which have reasoned that "a communication to an official administrative agency, which communication is designed to prompt action by that agency, is as much a part of the 'official proceeding' as a communication made after the proceedings have commenced." (*King v. Borges, supra*, 28 Cal.App.3d at p. 34; see also *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783; *Passman v. Torkan* (1995) 34 Cal.App.4th 607, 619; *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1503-1504; *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753; *Imig v. Ferrar* (1977) 70 Cal.App.3d 48, 55; *Martin v. Kearney* (1975) 51 Cal.App.3d 309, 311.)

The Reporting Act provides for the furnishing of investigative audit reports to "official administrative agencies" to "prompt action by those agencies" within the meaning of these cases. The Reporting Act directs the State Auditor, if he or she has reasonable cause to believe that a state employee or agency has engaged in any improper governmental activity, to report the nature and details of the activity to the head of the employing agency, the appropriate appointing authority, or "any

other authority that the State Auditor determines appropriate." (Gov. Code, § 8547.7, subd. (a).) The head of the employing agency or appropriate appointing authority must then report monthly to the State Auditor until "final action has been taken" on the report. (Gov. Code, § 8547.7, subd. (b).)

One policy underlying the absolute privilege for statements made in governmental investigations and reports of misconduct "is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing." (*Imig v. Ferrar, supra,* 70 Cal.App.3d at p. 55; see also *O'Shea v. General Telephone Co., supra,* 193 Cal.App.3d at p. 1048.) This consideration is especially pertinent here because the express purpose of the Reporting Act is to foster such communications. (Gov. Code, § 8547.1.) the reporting act seeks to encourage reports of improper governmental activities by keeping whistleblowers' identities confidential and protecting them from reprisals. (Gov. Code, § 8547.5, § 8547.8, et seq.)

If respondents' statements in an investigative audit were not absolutely privileged, then whistleblowers' reports of improper activities would also lack that protection, and the resulting exposure would undermine the effectiveness of the Reporting Act. As other courts have stated, "there must be an open channel of communication by which citizens can call [the investigator's] attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel. A qualified privilege is inadequate protection under the circumstances. . . . [¶] The importance of providing to citizens free and open access to governmental agencies

for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual. Thus the absolute privilege is essential." (*King v. Borges, supra,* 28 Cal.App.3d at p. 34; see also *Williams v. Taylor, supra,* 129 Cal.App.3d at pp. 753-754; *Imig v. Ferrar, supra,* 70 Cal.App.3d at pp. 55-56.)

Appellant contends that, even if Reporting Act audits are "official proceedings" under Civil Code section 47, subdivision (b), the investigative audit and report in this case were not "authorized by law" as required by that statute. Her arguments in this regard are that respondents acted in excess of their jurisdiction in various respects. We will assume without deciding that acts in excess of jurisdiction are outside the privilege for "authorized" official proceedings. There were no such acts here in any event.

Appellant contends that the CPRT audit was unauthorized because the Reporting Act is unconstitutional insofar as it provides for audits of the University of California.[2] This argument is based on the University's status as "a constitutionally autonomous entity generally exempt from state regulation." (*Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 582.) However, the University is subject among other things "to the specific provisions set forth in article IX, section 9." (*San Francisco Labor Council v. Regents of University of California*

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[2] The University itself evidently does not take this position. The request for the search warrant in this case included a letter from the University's Deputy General Counsel to respondent Campbell stating that "the University has cooperated with the State Auditor and intends to continue to do so."

(1980) 26 Cal.3d 785, 789.) California Constitution, article IX, section 9, subdivision (a) permits "such legislative control as may be necessary to insure the security of [the University's] funds." We conclude that this provision authorizes Reporting Act investigations of improper governmental activities at the University.

Appellant argues that the Reporting Act does not permit release of investigative audits to the public, or, alternatively, that it does not permit audits of the University to be made public. However, the Reporting Act provides that the term " 'State agency' includes the University of California for purposes of Sections 8547.5 to 8547.7, inclusive." (Gov. Code, § 8547.2.) Government Code section 8547.5 provides for the conduct of investigative audits, and Government Code section 8547.7, subdivisions (a) and (c) provide for the furnishing of audit reports to appropriate agencies, as well as the "issu[ance]" of reports that have been "substantiated," and the release of investigative "findings" if "deemed necessary to serve the interests of the state." Thus, the Reporting Act does not distinguish University audits from other audits for purposes of their issuance and release. The only question is whether the State Auditor's discretion to "issue" reports and "release" findings under Government Code section 8547, subdivision (c), extends to making them public.

Although the statute does not expressly refer to the release of investigative audit reports and findings "to the public" (compare Gov. Code, § 8546.1 [reports of agency financial and performance audits "shall be made available to the public"]), the State Auditor submits that this is the statute's intent. Consistent with that construction, the

report in this case was released to the press, and it includes a note on the cost of copies and how they may be ordered.

"An administrative application of the language of an act is entitled to respect by the courts, and unless clearly erroneous is a significant factor to be considered in ascertaining the meaning of a statute." (*Mudd v. McColgan* (1947) 30 Cal.2d 463, 470; see also *Nipper v. California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 45; *Santillano v. State Personnel Bd.* (1981) 117 Cal.App.3d 620, 625.) The State Auditor's interpretation of Government Code section 8547.7 does not appear "clearly erroneous"; it is, to the contrary, supported by the language of the statute.

Government Code section 8547.7, subdivisions (a) and (b) provide for reports to agencies with the power to act on the State Auditor's findings, and for follow up reports by those agencies. Since those subdivisions cover the subject of enforcement in light of the State Auditor's findings, subdivision (c) must serve some other purpose. This inference is strengthened by subdivision (c)'s stipulation that the identity of the individuals involved in the reports thereunder are to be kept confidential. No such confidentiality could be maintained in reports for possible enforcement action because the responsible agency would need to know the identities of the individuals involved. It thus appears that subdivision (c) has a purpose distinct from those of subdivisions (a) and (b), and we must construe the provision so as to effectuate that separate purpose (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476).

The purpose of Government Code section 8547.7 subdivision (c) is evident from the structure of the statute. If, as has been stated, subdivision (c) reports and findings are not aimed at remedial action then their purpose must be merely informational, and if, as has been indicated, government agencies are informed pursuant to subdivisions (a) and (b), then it must be the public who is being informed under subdivision (c). No audiences for audit reports are apparent other than the agencies which are empowered to act on them and the citizens who have paid for them. Accordingly, we concur in the State Auditor's reading of Government Code section 8547.7, subdivision (c), and hold that it provides for the release of reports and findings to the public.

Appellant thinks it "absurd to imagine," in light of what she calls "the extremely limited scope of disclosure permitted under [Government Code section 8547.7] as a whole," that "the Legislature intended to authorize the State Auditor to release any or all of this same confidential investigative audit material to anyone and everyone in the whole wide world." Statutes should be interpreted, of course, to avoid absurd and inconsistent results. (*Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Education* (1991) 235 Cal.App.3d 1182, 1186.) However, public disclosure of reports under Government Code section 8547.7, subdivision (c) does not conflict with the balance of the Reporting Act. Such disclosure may further the law's purposes by serving as a deterrent to misconduct and adding to the pressure for remedial action. (See generally, *Gellhorn, Adverse Publicity By Administrative Agencies* (1973) 86 Harv.L.Rev. 1380, 1382-1383.) Thus, our interpretation of the statute is consistent with its aims as

well as its language. The State Auditor did not act in excess of jurisdiction in making the CPRT audit report public.

Appellant contends that the State Auditor exceeded his authority in charging her with a conflict of interest. She notes that, shortly after the CPRT audit was completed, the Fair Political Practices Commission cleared her of any conflict of interest under Government Code section 82030, and she argues that this Commission has exclusive jurisdiction over alleged conflicts of interest. However, the audit report alleged that the CPRT administrator had a conflict of interest under Government Code section 1090 (employees' financial interest in contracts made in their official capacity), not a conflict of interest under the Political Reform Act of 1974 (Gov. Code, § 87100 et seq.). The violation of *any* conflict of interest statute is in any event within the broad definition of "improper governmental activities" which may be investigated by the State Auditor under the Reporting Act. (Gov. Code, § 8547.3, subd. (b), § 8547.5.)

Appellant submits that the Bureau and the State Auditor function under the Reporting Act like a permanent grand jury over state agencies, and she reasons that, because the Legislature has not made grand jury reports fully privileged (Pen.Code, § 930 [no privilege for comments about unindicted individuals]), it could not have intended for Reporting Act reports to be privileged either. However, the Legislature has not enacted any law like Penal Code section 930 for Reporting Act reports, or otherwise excepted them from the privilege of Civil Code section 47, subdivision (b)(3) (compare *Begier v. Strom* (1996) 46 Cal.App.4th 877, 885 [exception for knowingly

false reports of child abuse]). Consequently, we have no basis to infer that any such exception is intended.

Because the absolute privilege of Civil Code section 47, subdivision (b)(3) covers all of appellant's tort claims (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194), the demurrer to those causes of action was correctly sustained without leave to amend.[3]

B. "Due Process" Claims

The complaint alleges that appellant was denied due process during the CPRT audit because she was not accorded the rights: to notice of the charges against her; to examine the evidence against her; to present evidence in her defense; and to the assistance of counsel.[4] Appellant's briefs refer to other elements of due process, such as rights to confrontation and cross-examination, as if she were alleging their deprivation as well. In addition to these procedural due process claims, the cause of action for violation of due process alleges that, during the course of the CPRT audit, respondents disclosed information about the audit in violation of the confidentiality

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[3] In view of this conclusion, we need not address whether any of the tort claims is barred by any other privilege or immunity.

[4] The record includes a 23-page letter written by appellant's counsel in July 1994 during the course of the CPRT audit responding to questions and issues raised by respondents Campbell and Tanner. However, for purposes of the demurrer we must assume the truth of the allegations that appellant had neither notice of the charges involved in the audit nor an opportunity to respond to them. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

provisions of the Reporting Act, and respondent Tanner made anti-Semitic remarks to appellant. All of these allegations are apparently based on the due process clauses of both the federal and state constitutions. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. 1, § 7, subd. (a).) Respondents demurred to these allegations on the ground, among others, that they failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

It appears that damages are the only remedy sought for the alleged due process violations. The complaint prays for reinstatement of appellant's employment, and for a permanent injunction against the defendants' "unlawful practices." However, these claims for equitable relief are evidently directed against defendants other than respondents. There is no argument or indication in the record that respondents have the power to restore appellant's employment. Appellant alleges that none of the agencies to which the audit's findings were referred took any action against her. Since the audit process, including follow-up by other agencies, has been completed, there are no continuing activities by respondents to enjoin.

Thus, the threshold question is whether the complaint states a cause of action for the recovery of *damages* on the constitutional claims. There is no cause of action for damages for violation of the right to due process under California Constitution, article I, section 7, subdivision (a). (*Bradley v. Medical Board* (1997) 56 Cal.App.4th 445, 462-463; see also *Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1473-1476.) This is dispositive of the state constitutional claims.

Actions under 42 U.S.C. section 1983 (hereafter § 1983) are the ordinary vehicle for recovery of damages in state court for federal constitutional violations. (See, e.g., *Bradley v. Medical Board, supra,* 56 Cal.App.4th at pp. 453-454; Steinglass, Section 1983 Litigation in State Courts (1997) §§ 2.5, 2.7.) Apart from section 1983, there is authority for recovery of damages for federal constitutional violations in a "*Bivens*-type action." (*Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1288; citing *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388, 390-397 [implied right of action for damages under U.S. Constitution]; see also *Stalnaker v. Boeing Co.* (1986) 186 Cal.App.3d 1291, 1303-1304.) However, appellant's briefs indicate that she is not pursuing a "*Bivens*-type" claim. Also, the complaint seeks attorney's fees, which are available only in section 1983 cases. (Steinglass, *supra,* § 5.2(b) [listing advantages of § 1983 over *Bivens* actions].) Thus, although the complaint does not refer to section 1983, we infer that appellant is suing under section 1983 insofar as she seeks damages for violations of the federal constitution. (See *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1463.)

The Bureau, as an arm of the state, is not liable for damages under section 1983. (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348; see *Sable Communications of California, Inc. v. Pacific Tel & Tel. Co.* (9th Cir. 1989) 890 F.2d 184, 191.) This is dispositive of appellant's federal constitutional claims against the Bureau.

The other respondents' liability for damages depends in the first instance on whether they are being sued in their official or individual capacities. (*Pitts v. County of Kern, supra,* 17 Cal.4th at p. 348 [state officials acting in

their official capacities are not subject to damages under § 1983]; *Wells v. Brown* (6th Cir. 1989) 891 F.2d 591, 592.) The complaint does not specify the capacities in which these respondents are sued. It merely alleges that the individual respondents are residents of the state, and that they acted "at least in part" in the course and scope of their employment with the Bureau.

Failure to specifically plead the defendant's capacity is grounds for dismissal of a section 1983 suit. (*Wells v. Brown, supra,* 891 F.2d at pp. 591-592.) although federal courts are split on the need for specific pleading on this point (*Hafer v. Melo* (1991) 502 U.S. 21, 24, fn.), the federal cases which have required specificity (e.g. *Wells v. Brown, supra,* at pp. 591-592; *Egerdahl v. Hibbing Community College* (8th Cir. 1995) 72 F.3d 615, 619-620; *Pelfrey v. Chambers* (6th Cir. 1995) 43 F.3d 1034, 1037-1038) are the most consistent with the California rule that statutory causes of action, including tort claims against the government, must be specifically pleaded (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795; 4 Witkin, Cal. Procedure (4th Ed. 1997) Pleading, § 579, pp. 675-676; see also *Imbler v. Pachtman* (1976) 424 U.S. 409, 417 [describing § 1983 claims as a "species of tort liability"]). Therefore, the federal constitutional claims for damages against the individual respondents were subject to demurrer for failure to identify the capacities in which those respondents were sued. (Code Civ. Proc., § 430.10.)[5]

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[5] In light of this conclusion, we need not determine whether the trial-type procedures appellant advocates are required in Reporting Act audits, or whether her other "due process" claims rise to the level of constitutional violations.

Although the demurrer to the due process claims was not sustained below on the grounds we discuss, our review extends to results not reasons. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 340, pp. 382-383.) Leave to amend is, in general, liberally granted (e.g., *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 911), and it can be shown for the first time on appeal how a complaint can be amended to state a cause of action (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621). However, it is the plaintiff's burden to make this showing (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742), and appellant's briefs ignore the threshold problems we have identified with respect to her due process claims. Thus, we find no cause to reverse.

III. CONCLUSION

The judgment of dismissal is affirmed with costs to respondents.

Hanlon, P.J.

We concur.

Poche, J.

Reardon, J.

(*Brauns v. Bureau of State Audits et al.*, A075423)

APPENDIX B

First Appellate District, Division Four, No. A075423
S075603

IN THE SUPREME COURT OF CALIFORNIA

ODELIA S. BRAUN, Appellant

v. (Filed Mar. 9, 1999)

BUREAU OF STATE AUDITS Et Al., Respondents

Appellant's petition for review DENIED.

GEORGE
Chief Justice